Petition

81-1448

NO. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RAYMOND INTERNATIONAL, INC.,
Petitioner

versus

GLENN PAUL BAKER, SR.,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

May a vessel owner be strictly liable *in personam* for an unseaworthy condition which arose after its vessel was delivered to another under bareboat charter?

LIST OF PARTIES

Pursuant to Supreme Court Rule 21.1(b) and 28.1, counsel for Petitioner certifies that all parties to this proceeding are named in the caption of the case. Petitioner, Raymond International, Inc. has the following non-wholly owned affiliate.

Raymond Saudi Arabia, Ltd.

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The decision below conflicts with decisions of four circuits all refusing to impose *in personam* liability on a vessel owner for unseaworthiness arising while the vessel is under bareboat charter to another and decides an important question of federal maritime law which has not been, but should be determined by this Court.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 656 F.2d 173 (5th Cir. 1981) and is reproduced as Appendix A. p. A-1; and the order of the Fifth Circuit denying the petitions for rehearing and rehearing *en banc* are reproduced as Appendix B, p. A-30.

STATEMENT OF JURISDICTIONAL GROUNDS

Judgment was rendered on September 14, 1981 by the United States Court of Appeals for the Fifth Circuit. Petitions for rehearing and rehearing *en banc* were timely filed and the order denying Raymond International Inc.'s request for rehearing was entered on November 2, 1981. This petition for writ of certiorari was filed within 90 days of the date of the denial of Rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

REGULATORY PROVISION INVOLVED

This case involves 46 CFR 221.7(a), which is reproduced as Appendix C, p. A-32. Before March 1, 1977, 46 CFR 221.7(a) read:

> (a) The Department of Commerce, Maritime Administration, hereby approves under sections 9 and 37 of the Shipping Act, 1916, as amended (52 Stat. 964; 40 Stat. 901; 46 U.S.C. 808 and 835) the charter to a person not a citizen of the United States of any vessel (including space in such vessel) documented under the laws of the United States, or the last documentation of which was under the laws of the United States, or owned in whole or in part by any person a citizen of the United States, or by a corporation organized under the laws of the United States or of any State, Territory, District or possession thereof, for a period of not more than six (6) months, or for a voyage or voyages the duration of which will probably not exceed six (6) months, except:
>
> (1) Demise or bareboat charters.

STATEMENT OF THE CASE

This suit arises out of injuries allegedly sustained by Plaintiff on or about September 10, 1978, when he was working as a pile driver rigger on the Barge LORETTA while it was engaged in constructing a marine pipeline trestle in the Persian Gulf pursuant to a contract between Raymond Saudi Arabia, Ltd. and Aramco (Arabian-American Oil Company).

Plaintiff filed this suit against Raymond International, Inc., the owner of the LORETTA. However, at the time, the LORETTA was under bareboat charter and operated by Raymond Saudi Arabia, Ltd. Raymond Saudi Arabia, Ltd. is not a party to this suit.

Defendant Raymond International, Inc. owns 100% of the stock of Raymond International of Delaware, Inc., which in turn owns a 50% interest in Raymond Saudi Araba, Ltd. The other 50% of Raymond Saudi Arabia, Ltd. stock is owned by Saudi Arabian corporations or Princes of the Saudi Arabian realm.

Raymond Saudi Arabia, Ltd. is an Arabian corporation formed in 1977 and chartered in Saudi Arabia. Raymond Saudi Arabia has its offices and principal place of business in Riyadh, Saudi Arabia. Raymond Saudi Arabia entered into a contract with Aramco (an agency of the Saudi Arabian government) for the construction of a marine pipeline trestle in the Arabian Gulf. This project began in the spring of 1977 and was completed in February or March of 1979.

Certain arrangements were made between Raymond Saudi Arabia, Ltd. and defendant Raymond International, Inc. through which Raymond International furnished its Barge LORETTA for Raymond Saudi Arabia's use on this project. Under this arrangement a billing system was established where-

by defendant, through Raymond International Builders 1/ billed Raymond International Builders (Liberia), Inc., who then in turn billed Raymond Saudi Arabia, Ltd. for the use of the LORETTA.

Defendant also provided other services to Raymond Saudi Arabia, Ltd. through the project engineering support group of Raymond International Builders. These services consisted of the purchasing of material, equipment, parts and interviewing applicants to determine whether they were qualified for the positions available with Raymond Saudi Arabia, Ltd.

Raymond-Saudi Arabia, Ltd. paid a fee to defendant for providing these services. Basically, defendant procured whatever material, supplies or personnel Raymond Saudi Arabia needed from the United States; however, all purchases and travel expenses for personnel were paid for out of Raymond Saudi Arabia's operating accounts in Houston. An employee of Raymond International Builders hired plaintiff to be a pile driver rigger for Raymond Saudi Arabia, Ltd. on the trestle project in the Persian Gulf. Plaintiff's employment contract clearly states that he was employed by Raymond Saudi Arabia, Ltd.

Baker asserted claims against Raymond International, Inc. under the general maritime law for unseaworthiness, under the Jones Act for negligence, and for maintenance and cure, wages to the end of the voyage, and damages and attorney's fees for arbitrary and unreasonable failure to pay maintenance and cure and wages.

1/ At the time of the accident and up until September 12, 1978, Raymond International Builders, Inc. was a division of Raymond International, Inc. On September 12, 1978, Raymond International Builders completed a corporate reorganization and became a wholly-owned subsidiary of Raymond International, Inc. Raymond International Builders (Liberia), Inc. is a wholly-owned subsidiary of Raymond International Builders, Inc.

On the morning of trial, the Court removed the "bareboat charter" issue from the case, on the ground that, under 46 C.F.R. Sec. 221.7(a), as a matter of law, there could be no valid bareboat charter between an American and a foreign corporation.

The court also ruled that Baker had no claim against Raymond International, Inc. under the Jones Act, for wages or for maintenance and cure unless Raymond International and Raymond Saudi Arabia, Ltd. were corporate alter agos or Baker was found to be a borrowed servant of Raymond International, Inc. The issues of corporate alter ego, borrowed servant, Jones Act negligence, unseaworthiness, maintenance and cure, unearned wages, arbitrary and unreasonable failure to pay maintenance and unearned wages, and damages and attorney's fees for failure to pay, were submitted to the jury.

The jury found that defendant and Raymond Saudi Arabia, Ltd. were corporate alter egos and that plaintiff was defendant's borrowed servant. They further found defendant to be negligent and the LORETTA unseaworthy.

The jury awarded compensatory damages of $370,188.00, and found maintenance due for "possibly one year or more" (which the Judge interpreted to be one year from the date of the verdict), at $12.00 per day and rendered an additional award of $370,188.00 for damages for Raymond International, Inc.'s arbitrary and unreasonable failure to pay maintenance and unearned wages. The jury further granted plaintiff attorney's fees in the "customary amount or as agreed between plaintiff and his attorney".

After the court entered judgment on the jury verdict, Raymond International moved for a judgment notwithstanding the verdict or for a new trial, or in the alternative, for a remittitur, and to amend the judgment. The trial court denied this motion in all respects, except the motion for judgment N. O. V. on

plaintiff's claim for damages and attorney's fees for Raymond International's failure to pay maintenance and cure. The court also granted a new trial on those issues in the event its judgment notwithstanding the verdict was reversed on appeal. The court then entered an amended judgment which eliminated all awards for damages and attorney's fees for failure to pay maintenance and cure, and limited the amount to $370,188.00, plus $8,520.00 in maintenance, plus interest and cost.

Raymond International appealed and plaintiff cross-appealed from that portion of the amended judgment which deleted the $370,188.00 in damages for failure to pay maintenance and unearned wages, and the attorney's fees for failure to pay maintenance and unearned wages. The Fifth Circuit affirmed in part, vacated and remanded in part. All issues relating to the employment relationship between defendant and plaintiff were reversed and remanded for a new trial [borrowed servant, corporate alter ago maintenance, cure, unearned wages and damages for failure to pay maintenance, cure and unearned wages].

The jury finding of borrowed servant was reversed because there was no supportive evidence in the record. The jury finding of corporate alter ego was reversed on the ground that, although the evidence may have been sufficient to sustain such a finding, the jury had not been properly instructed on the factors to be considered. The Fifth Circuit affirmed the trial court's alternative grant of a new trial on defendant's liability for maintenance, cure and wages to the end of the voyage, and for damages for failure to pay those items. (Appendix A, p. A-1).

Nevertheless, despite the absence of an employment relationship between defendant and plaintiff and the lack of responsibility of defendant for the acts of Raymond Saudi Arabi, Ltd., the Fifth Circuit affirmed the award of compensatory damages solely on the ground that defendant, as ship-

owner, was liable for the unseaworthiness of the LORETTA, even assuming that the unseaworthiness arose after the delivery of the vessel under a bareboat charter. Relying on 46 C. F. R. Sec. 221.7(a), the Fifth Circuit declared void any attempted bareboat charter between defendant and RSA, but went on to rule that, even assuming a valid bareboat charter, defendant, as shipowner, cannot escape *in personam* liability for unseaworthiness.

Petitions for rehearing and rehearing *en banc* were timely filed by Raymond International and were denied on November 2, 1981.

REASONS FOR GRANTING THE WRIT

The decision by the Fifth Circuit allowing recovery, *in personam*, against Raymond International, Inc., as a vessel owner, for an unseaworthy condition which arose after delivery under a bareboat charter is contrary to the traditional principle that delivery of a vessel, in a seaworthy condition, under a bareboat charter to another relieves the vessel owner of all responsibility for unseaworthy conditions created only after delivery. 2/ Overwhelming authority, has traditionally stated that the delivery of a vessel to a bareboat charterer in a seaworthy condition terminates the owner's liability for conditions that arise only thereafter. 3/

The Fifth Circuit decision in this case would grant seamen recourse *in personam* against a vessel's owner for unseaworthiness arising only after the vessel is in the exclusive possession

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2/ No evidence was presented which tended to, or purported to, establish unseawrothiness prior to the relinquishment of the LORETTA to Raymond Saudi Arabia, Ltd.

3/ *Baker v. Raymond International, Inc.*, 656 F.2d 173, 183 (5th Cir. 1981).

and control of a bareboat charterer.

In so ruling, the Fifth Circuit states that:

> The Supreme Court has twice avoided deciding whether a bareboat charter relieves the owner of liability for unseaworthiness. *See Reed v. Steamship Yaka*, 373 U.S. 410, 411, n. 1 83 S. Ct. 1349, 1351 n. 1, 10 L. Ed.2d 448, 450 n. 1 (1963); *Guzman v. Pichirilo*, 369 U.S. 698, 700, 82 S. Ct. 1095, 1096, 8. L. Ed. 2d 205, 208 (1962). The lower courts have generally agreed that, after control of the vessel is turned over to the charterer, the owner remains liable for injuries caused by defects in the vessel that existed before the commencement of the charter. In several instances, assuming the answer to the question now directly raised, courts have, however, stated that delivery of the vessel to a bareboat charterer terminates the owner's liability for conditions that arise only thereafter" (footnotes omitted, at 1839).

The Fifth Circuit however, fails to note that in every instance in which the question has been directly presented, the courts have refused to impose *in personam* liability on a vessel owner for conditions which arose while the vessel was under bareboat charter to another. *Williams v. McAllister Bros., Inc.*, 534 F.2d 19 (2d Cir. 1976); *Kerr McGee Corp. v. Law*, 479 F. 2d 61, 63 (4th Cir. 1973); *In re Marine Sulphur Queen*, 460 F.2d 89, 100 (2d Cir.), cert. denied 409 U.S. 982 (1972); *Ramos v. Beauregard, Inc.*, 423 F.2d 916, 917-18 (1st Cir.), cert. denied, 400 U.S. 865 (1970); *Haskins v. Point Towing Co.*, 421 F.2d 532, 536 (3rd Cir.), cert. denied, 400 U.S. 834 (1970); *Vitozi v. Balboa Steamship Co.*, 163 F.2d 286 (1st Cir. 1947); *In re New York Dock Co.*, 61 F.2d 777 (2d Cir. 1932); *Buras v. Shell Oil Co.*, 478 F. Supp 1163 (E. D. La.

1979); *Rodriguez v. Litton Industries Leasing Corp.*, 428 F. Supp 1232, 1234 (D. P. R. 1977); *Muscelli v. Frederick Starr Contracting Co.*, 296 N. Y. 330 (1947).

In each instance where liability has been imposed on the vessel owner, the courts have uniformly entered specific findings of unseaworthiness preceding delivery of the vessel under the charter party. *Nat G. Harrison Overseas Corp. v. American Tug Titan*, 516 F.2d 89, 96 (5th Cir.) modified per curiam, 520 F.2d 1104 (1975); *Grillea v. United States*, 229 F.2d 687, 689 (2d Cir. 1956); *Cannella v. Lykes Bros. Steamship Co.*, 174 F.2d 794, 795 (2d Cir.), cert. denied, 338 U. S. 859 (1949); *Solet v. M/V CAPT. H. V. DUFRENE*, 303 F. Supp. 980, 984 (E.D. La. 1969); *Rodriguez v. Coastal Ship Corp.*, 210 F. Supp. 38 (S.D.N.Y. 1962).

This imposition of *in personam* strict liability solely by virtue of title is unprecedented, unwarranted and arbitrarily exacts a duty where there is no corresponding element of control to ensure that the duty is fulfilled.

Whereas, unseaworthiness has been described as a species of liability without fault, a species of liability without control has never existed in admiralty. Not only does the decision below impose liability on the owner for conditions for which the owner may be blameless, it imposes liability for conditions over which the owner may be powerless.

It appears that the source of some confusion may be a consequence of the often imprecise use of the term "strict liability" or "liability without fault".

The shipowner's liability for breach of the warranty of seaworthiness has been analogized to the liability of a manufacturer for breach of warranty of fitness of its product. *Williams v. Employers Liability Assurance Corp., Ltd.*, 296 F.2d 569 (5th Cir. 1961).

But this liability is "delictual, imposed . . . . because the party responsible for the product, *in control of its preparation, and therefore in a superior position,* breached his duty to the ultimate consumers *who rely on him* to furnish goods, reasonably safe for human consumption." *Lartigue v. R. J. Reynolds Tobacco Co.*, 317 F.2d 19, 34 (5th Cir. 1963).

These discussions serve to illustrate that "strict liability" for unseaworthiness not be imposed totally "without fault", but still requires the breach of an obligation.

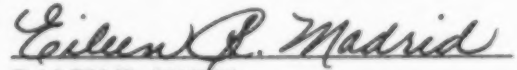
Here, however, the court extends liability beyond the reasonable scope of the underlying obligation. Liability arises though the shipowner has turned over all management and control of the vessel to another, on whose initiative and for whose profit the venture had been undertaken. In effect, liability arises by virtue of merely holding title to the vessel.

The decision below would impose what may be unlimited personal liability for conditions wholly beyond the owner's control. 4/ In effect, it makes the vessel owner the charterer's keeper and purports to infuse vicarious liability where no agency or employment relationship exist. As such, the decision has far-reaching implications which should be reviewed by this Court.

4/ In all species of strict liability some element of control is present. In products liability, the manufacturer is held responsible for things he creates; in admiralty, the vessel owner, in absence of a bareboat charter, is responsible for the ship over which he has custody.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for certiorari should be granted.



RALPH E. SMITH
EILEEN R. MADRID
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that three copies of this Petition for Writ of Certiorari have been sent to each counsel of record for respondent by depositing same in the United States Mail, postage prepaid this 1st day of February, 1982.

I further certify that all parties required to be served have been served.

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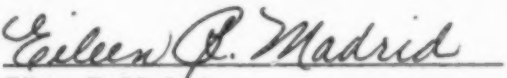

Eileen R. Madrid

Appendix

APPENDIX A

Glenn Paul BAKER, Sr.,
Plaintiff-Appellee, Cross-Appellant,

v.

RAYMOND INTERNATIONAL, INC.,
Defendant-Appellant, Cross-Appellee.

No. 80-3019.

United States Court of Appeals,
Fifth Circuit.

Unit A

Sept. 14, 1981.

Seaman brought action against barge owner to recover for injuries sustained while working on barge. The United States District Court for the Eastern District of Louisiana, Morey L. Sear, District Judge, awarded seaman compensatory damages, and barge owner appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) seaman failed to establish barge owner's liability under borrowed servant doctrine; (2) charge did not provide jury with an adequate understanding of factors to be considered in reaching finding holding barge owner liable as seaman's actual Jones Act employer; (3) fact that seaman's nominal employer had complete possession and control of the barge did not absolve barge owner of liability; (4) even if there had been a bareboat charter to the nominal employer, it would not have absolved barge owner of liability for the barge's unseaworthiness; and (5) new trial was granted on issue of seaman's right to maintenance, cure and wages to end of the voyage.

Affirmed in part, vacated and remanded in part.

1. Seaman key 29(1)

Although recovery may be had in admiralty for negligence resulting in injury of a person who is not an employee, the Jones Act provides the only negligence remedy for an employee against his employer; correlatively, it is applicable only if the employment relationship exists. Jones Act, 46 U.S.C.A. §688.

2. Employers' Liability key 4

"Borrowed servant doctrine," functional rule that places risk of a worker's injury on his actual rather than his nominal employer, permits injured worker to recover from company that was actually directing his work and may also determine which of possible employers ultimately bears cost of the injury.

See publication Words and Phrases for other judicial constructions and definitions.

3. Employers' Liability key 4

An injured worker may show that he was a borrowed servant at the time of his injury by establishing that employer against whom recovery is sought had power to control and direct servant in performance of his work.

4. Master and Servant key 301(4)

Criteria for determining when a servant has been borrowed by another employer include: who has control over the employee and work he is performing; whose work is being performed; whether there was an agreement, understanding, or meeting of the minds between original and borrowing employer; whether employee acquiesced in the new work situation; whether original employer terminated his relationship with

the employee; who furnished tools and place for performance; whether the new employment was over a considerable length of time; who had right to discharge the employee; and who had obligation to pay the employee.

5. Seaman key 29(5.14)

Injured seaman failed to establish that barge owner was liable for his injuries under the borrowed servant doctrine. Jones Act, 46 U.S.C.A. §688.

6. Corporations key 1.4(5)

If a controlling stockholder uses a closed corporation as his personal business conduit, he may be held responsible for debts of his "alter ego."

7. Corporations key 1.5(3)

A parent corporation may be held liable for debts of a subsidiary if parent fails to observe formalities of separate incorporation, including adequate capitalization of the subsidiary.

8. Corporations key 1.4(3)

If a corporation is employed to perpetrate a fraud upon a creditor, the creditor may impose liability on the corporation's stockholders.

9. Corporations key 1.4(4)

A principal may so dominate activities of a corporation that it is necessary to treat the dominated corporation as an agent of the principal.

10. Corporations key 179

Ownership of a controlling interest in a corporation entitles controlling stockholder to exercise normal incidents of stock ownership, such as right to choose directors and set general policies, without forfeiting protection of limited liability.

11. Corporations key 1.5(3)

To justify extraordinary step of holding dominant shareholder corporation liable for debts of controlled corporation, jury must find that the control amounts to total domination of the subservient corporation to the extent that the subservient corporation manifests no separate corporate interests of its own and functions solely to achieve purposes of the dominant corporation.

12. Corporations key 1.7(2)

In seaman's action against barge owner, corporate parent of seaman's nominal employer to recover under the Jones Act for injuries sustained while working on the barge, court's charge did not provide jury with an adequate understanding of factors to be considered in reaching its finding that barge owner's control of subsidiary was sufficient for imposition of vicarious liability Jones Act, 46 U.S.C.A. §688.

13 Seaman key 29(5.4)

Both ship and shipowner are liable to seamen for injuries caused by unseaworthiness.

14. Seamen key 29(5.3)

"Warranty of seaworthiness," duty to provide a seaworthy vessel, extends not only to owner's employees but to all who do seamen's work and is an absolute, continuing, and nondeleg-

able incident of vessel ownership.

See publication Words and Phrases for other judicial constructions and definitions.

15. Contracts key 136

A court cannot enforce an illegal contract to detriment of of innocent third party.

16. Seamen key 29(5.4)

Barge owner's mere surrender of control of its vessel did not absolve it from liability to seaman for injuries caused by unseaworthiness of the barge.

17. Seamen key 29(5.4)

Even if there had been a bareboat charter of barge by owner to seaman's nominal employer, it would not have absolved owner of liability to injured seaman for unseaworthiness of the barge.

18. Seamen key 29(5.4, 5.19)

A seaman may have recourse in personam against owner of an unseaworthy vessel, without regard to whether owner or bareboat charterer is responsible for the vessel's condition; the personal liability is not, however, unlimited, but is subject to ceiling established by the Limitation Act. 46 U.S. C. A. §183(a).

19. Seamen key 11(1)

Although an injured seaman's right to maintenance, cure, and wages to end of voyage is implied by law, it arises out of the contract of employment.

20. Seamen key 11(9), 26

Seamen may sue in rem to recover maintenance, cure and wages to end of the voyage, and those forms of support remain particular responsibility of employer rather than vessel's owner.

21. Seamen key 11(9), 26

Judgment finding barge owner liable to injured seaman for maintenance, cure, and wages to the end of the voyage was vacated in absence of a finding establishing barge owner as seaman's employer and since seaman had not sued the barge in rem.

Deutsch, Kerrigan & Stiles, Ralph E. Smith, Eileen Madrid, New Orleans, La., for defendant-appellant, cross-appellee.

Henderson, Hanemann & Morris, Philip E. Henderson, Houma, La., for plaintiff-appellee, cross-appellant.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before SKELTON *, Senior Judge, and RUBIN and REAVLEY, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

The complex relationship between an American corporation and the affiliated Saudi Arabian corporation through which it transacts business in that country requires that we carefully examine whether the American corporation is responsible

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* Senior Judge of the United States Court of Claims, sitting by designation.

under the Jones Act and general maritime law for injuries to American Seamen working on foreign waters.

Glenn Baker, an American seaman accidentally injured while working in the Persian Gulf, seeks to hold Raymond International, Inc. (Raymond), an American corporation, liable for his injuries even though, at the time of the accident, he was nominally employed by Raymond's affiliated Saudi Arabian corporation, Raymond Saudi Arabia, Ltd. (RSA). At trial, Baker based his claims on the theory that he was Raymond's borrowed seaman under the Jones Act; that because Raymond treated RSA as a mere instrumentality, the court should pierce RSA's corporate veil and regard Raymond as his employer under the Jones Act; and that Raymond should be held liable for furnishing RSA with the unseaworthy barge on which the accident occurred. Responding to special interrogatories, 1/ the jury found for Baker on all three claims. Relying exclusively on the unseaworthiness of the barge, we affirm the award of compensatory damages. We reverse and remand for a new trial on the issue of liability for maintenance, cure, and wages to the end of the voyage, and we affirm the trial judge's alternative grant of a new trial on the American corporation's liability for damages for failure to pay these items. These apparently anomalous results are occasioned by the unusual manner in which the issues were framed and the case was tried. We now explain.

I.

Glenn Baker contended that the sole defendant, Raymond, was responsible for the injuries he sustained. In addition to de-

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1/ We have often commended submission of complex cases to juries on interrogatories. *See Guidry v. Kem Mfg. Co.*, 598 F.2d 402, 405 (5th Cir.), *cert. denied*, 445 U.S. 929, 100 S. Ct. 1318, 63 L. Ed. 2d 763 (1979); Brown, *Federal Special Verdicts: The Doubt Eliminator*, 44 F.R.D. 338 (1967).

fending on the merits. Raymond sought to show that Baker was employed by RSA, only 50% of whose stock was owned by Raymond, through a subsidiary, and that, if Baker was injured as a result of either negligence or unseaworthiness, Raymond itself was not liable.

Baker's trip to the Persian Gulf began when, unemployed after working in the North Sea, he responded to a Raymond newspaper advertisement in a New Orleans newspaper, the *Times Picayune*, offering marine construction workers employment in Saudi Arabia. The advertisement stated: "We are currently recruiting for a number of skilled craft personnel to work on our LPG pipeline trestle in the Arabian Gulf." Another Raymond advertisement stated: "Positions continue to open up on our construction work force now building a major piling trestle in the Arabian Gulf." Applicants were invited to send a resume to Manager, Foreign Recruiting, Raymond International, Inc. or to Gene La Grose or Herb Morgan at Raymond International, Inc., Houston, Texas. Instead of writing, Baker went to Raymond's office in Houston, where he was interviewed by a Raymond employee and accepted for employment.

After taking a physical examination, Baker signed an employment contract in Raymond's office. This contract stated that he was employed by RSA, and was signed by a representative of RSA. The person who signed the contract for RSA, however, was a Raymond employee. Baker testified that the employee who explained the contract to him told him that Raymond and RSA were the same company and that the difference in names was only for "tax purposes."

On the same day, a Raymond employee gave Baker a form for claiming income tax benefits while employed abroad. This form, filled in by a Raymond employee for Baker, stated: "I am employed by Raymond International, Inc." Baker also signed a life insurance beneficiary designation, filled in by a

Raymond employee, stating that his employer was Raymond.

Baker was transported to Saudi Arabia and began work. He received a monthly pay sheet stamped with Raymond's logo, the letters RI superimposed on a globe, which had also appeared on each of the newspaper advertisements.

A trestle extending seven miles into the Persian Gulf was being built pursuant to a contract between RSA and the Arabian American Oil Company (Aramco). Baker was assigned to this project, working aboard the pile-driving barge *Loretta*, which belonged to Raymond, as a pile-driver-rigger. In September, together with other workers, he was engaged in repairing the barge when he was injured.

After his return to the United States, Baker sued Raymond, as sole defendant, under the Jones Act for negligence causing his injury and for unseaworthiness of the *Loretta*. The theory of this suit was that Raymond was Baker's employer, and, as owner, was responsible for the condition of the *Loretta*. On the morning that trial commenced, before the jury was empaneled, the trial judge told counsel that Baker could recover on the Jones Act claim only by proving that Baker was Raymond's borrowed servant or that RSA was Raymond's instrumentality. After brief expostulation, Baker's counsel accepted these theses. Raymond's counsel objected, but evidently was able to confront the revised claims; Raymond does not contend on appeal that the changes so surprised it as to have required postponing the trial.

In response to interrogatories, the jury found that Raymond was negligent in a manner that caused Baker's injury and that the *Loretta* was unseaworthy in a manner that proximately caused his injury, and returned a verdict in Baker's favor. No issue is raised on appeal with regard to either of these findings.

Raymond's defense was that Baker was employed solely

by RSA, and that, because RSA had chartered the *Loretta*, Raymond was not liable for its condition. The jury was not asked, however, whether Raymond was Baker's employer or was responsible for the condition of the *Loretta*. Instead, the interrogatories asked whether Raymond was RSA's corporate alter ego or whether Baker was Raymond's borrowed servant. On appeal, Raymond contends both that the alter ego jury charge was erroneous and that the evidence was insufficient to support the borrowed servant verdict.

Raymond presented evidence that it owns none of the stock of RSA. It does own all of the stock of Raymond International of Delaware, Inc., which, in turn, owns 50% of the stock of RSA. The remainder of the stock of RSA is owned by Saudi Arabian corporations and princes of the Saudi Arabian realm. The reason, business or otherwise, for this complex arrangement does not appear in the record.

RSA was chartered in Saudi Arabia in 1977. Some of its officers and directors were officers and directors of Raymond. Shortly after its formation, it entered into a contract with Aramco to build the marine trestle, its first project. 2/ Raymond recruited employees in the United States for this work and interviewed them. A Raymond employee testified that RSA made the final employment decision, but the record does not show how the decision was made or what person made it. 3/

2/ Up to the time of trial, it had started no other projects. There was testimony that it was "free to do so." At the time of trial it was bidding on other jobs.

3/ There was other evidence that Raymond considered the trestle job as its project. Its annual report to its stockholders carried a photograph of the trestle, referred to the project as "our" trestle job, and stated that Raymond was doing the work. The report does not mention RSA. There was also other evidence of corporate affinity: Raymond maintained personnel files on employees of RSA, and the chief executive officer of RSA was an employee of another Raymond affiliate, Raymond International United Kingdon.

Raymond furnished the barge *Loretta* for the project. It purchased material, equipment, and parts for the barge. It also arranged transportation and provided group insurance plans and retirement plans for RSA employees when it recruited. The costs of these services were paid by RSA, some from RSA operating accounts maintained in Houston banks and others, together with a fee for Raymond's services, by intercorporate charges. Because RSA was not joined as a defendant, we need not consider whether it was doing business or was amenable to service of process in the United States.

II. Jones Act Claim

A. The Borrowed Servant Doctrine

[1] The Jones Act, 46 U.S.C. §688, confers upon a seaman the right to sue his employer for negligence resulting in his personal injury, extending to him the rights accorded railway workers under the Federal Employers' Liability Act, 45 U.S.C. §§51–60. Although recovery may be had in admiralty for negligence resulting in the injury of a person who is not an employee, the Jones Act provides the only negligence remedy for an employee against his employer. *Ivy v. Security Barge Lines, Inc.*, 606 F.2d 524, 525 (5th Cir. 1979) (en banc), *cert. denied*, 446 U.S. 956, 100 S. Ct. 2927, 64 L. Ed. 2d 815 (1980). Correlatively, it is applicable only if the employment relationship exists. *Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783, 791, 69 S. Ct. 1317, 1322, 93 L. Ed. 1692, 1698 (1949); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 394, 90 S. Ct. 1772, 1784, 26 L. Ed. 2d 339, 353 (1970); *Spinks v. Chevron Oil Co.*, 507 F.2d 216, 224 (5th Cir. 1975); G. Gilmore & C. Black, *The Law of Admiralty* §§ 6-21, –21(a) (2d ed. 1975) (hereinafter *Gilmore & Black*).

The employer-employee bond is usually evident: the vessel owner engages the seaman, pays his wages, and, through the master, directs his work. In the complex industrial arrange-

ments typical of offshore petroleum development operations, however, the attributes of employment may not all inhere in the vessel owner. A number of companies may engage in a single project, usually by subcontract from the company undertaking the venture. Each subcontractor undertakes to do a particular task as an independent contractor, but a worker on the payroll of one company may actually perform his job under the direction and control of another. Moreover, the vessel on which the work is performed may be owned by the firm that issues the employee's paychecks, by the principal contractor, or by a third party, and may be chartered or otherwise provided for the project.

In the usual case involving injury to a seaman, either the principal contractor or the shipowner is more affluent and accessible than the subcontractor; a worker nominally employed by a subcontractor seeks to establish an employment relationship with the better target. ***Spinks v. Chevron Oil Co.***, 507 F.2d 216, 224 (5th Cir. 1975). If that target company has, in fact, assumed significant attributes of an employer, it will not be permitted to shed the employer's costume when the worker is injured. ***See United States v. W. M. Webb, Inc.***, 397 U.S. 179, 192, 90 S. Ct. 850, 856, 25 L. Ed. 2d 207, 215 (1970); ***Barrios v. Louisiana Constr. Materials Co.***, 465 F.2d 1157, 1163–66 (5th Cir. 1972); ***Gilmore & Black, supra,*** §6–21(a);

[2] The borrowed servant doctrine is the functional rule that places the risk of a worker's injury on his actual rather than his nominal employer. It permits the injured worker to recover from the company that was actually directing his work. It may also determine which of the possible employers ultimately bears the cost of the injury. ***See Spinks v. Chevron Oil Co.***, 507 F.2d 216, 224–26 (5th Cir. 1975).

However, the actual employer does not wholly displace the nominal one. If the worker is hired and paid by a subcontractor,

he may look to it as his employer even though, on the job, he worked under the direction and control of the principal contractor. *Id.* at 224–25. When the contractual or operational relationship between those who direct a seaman's work results in his being on the payroll of one company and obeying the behest of another, the injured worker is not required to bear the risk that he will not select the proper target for his claim.

At trial, Baker did not contend that Raymond was his nominal, or contractual employer, or that the contract of employment should be reformed, or that Raymond was estopped to deny that it stood in an employer's role to him. The first interrogatory submitted to the jury assumed that Raymond was not his employer, and asked whether Raymond had borrowed Baker from his contractual employer, assumed presumably to be RSA.

[3, 4] An injured worker may show that he was a borrowed servant at the time of his injury by establishing that the employer against whom recovery is sought had " 'the power to control and direct the [servant] in the performance of [his] work.' " *Gaudet v. Exxon Corp.*, 562 F.2d 351, 355 (5th Cir. 1977), *cert. denied*, 436 U.S. 913, 98 S. Ct. 2253, 56 L. Ed. 2d 414 (1978) (quoting *Standard Oil Co. v. Anderson*, 212 U.S. 215, 221–22, 29 S. Ct. 252, 254, 53 L. Ed. 480, 483–84 (1909)). This circuit has established several criteria for determining when a servant has been borrowed by another employer:

(1) Who has control over the employee and the work he is performing, beyond mere suggestion of details or cooperation?

(2) Whose work is being performed?

(3) Was there an agreement, understanding, or meeting of the minds between the original and the borrowing employer?

(4) Did the employee acquiesce in the new work situation?

(5) Did the original employer terminate his relationship with the employee?

(6) Who furnished tools and place for performance?

(7) Was the new employment over a considerable length of time?

(8) Who had the right to discharge the employee?

(9) Who had the obligation to pay the employee?

Gaudet v. Exxon Corp., 562 F.2d at 355 (citing *Ruiz v. Shell Oil Co.*, 413 F.2d 310, 312–13 (5th Cir. 1969)).

[5] At the trial, Baker introduced virtually no evidence establishing any of these factors. Raymond's evidence, uncontradicted by Baker, was that the master of the vessel, and its crew, were employed by RSA, the vessel was operated by RSA, and RSA paid Baker's wages. Although Raymond owned the vessel, there was no evidence that those employees who were found to be negligent were Raymond employees. The record is equally silent on any borrowing of Baker himself by Raymond. If, as the borrowed servant doctrine assumes, we begin with the premise that Baker was an RSA employee, "the facts and inferences point so strongly and overwhelmingly" to the conclusion that Raymond did not later borrow Baker "that the Court believes that reasonable men could not arrive at a contrary verdict." *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc). Accordingly, we reverse the jury's verdict on this issue and proceed to examine the other basis for Baker's recovery under the Jones Act.

B. RSA as Raymond's Instrumentality

Although scholars may debate its economic importance,[4] the principle of limited liability remains a dominant characteristic of American corporation law. Ordinarily, a creditor has recourse only against the corporate entity incurring the liability, not against parent corporations, stockholders, or other parties connected with the entity. Under exceptional circumstances, however, the court will exercise their equitable power to hold the controlling parties liable for the obligations of their instrumentality. *See FMC Fin. Corp. v. Murphree*, 632 F.2d 413, 421, 422 (5th Cir. 1980); *Krivo Indus. Supply Co. v. National Distillers & Chem. Corp.*, 483 F.2d 1098, 1102–07 (5th Cir. 1973), *modified per curiam*, 490 F.2d 916 (5th Cir. 1974); *Berkey v. Third Ave. Ry.*, 244 N.Y. 84, 94, 155 N.E. 58, 61 (1926) (Cardozo, J.). *See generally* 1 W. Fletcher, *Cyclopedia of the Law of Private Corporations* §§41–46 (rev.perm.ed. 1974 & Cum. Supp. 1980) (collecting cases).

[6-9] Beyond the commonplace that the courts will ignore the principle of limited liability when " 'the justice of the case'" requires, *Krivo Indus. Supply Co. v. National Distillers & Chem. Corp.*, 483 F.2d 1098, 1103 (5th Cir. 1973) (quoting *United States v. Reading Co.*, 253 U.S. 26, 63, 40 S. Ct. 425, 434, 64 L. Ed. 760, 781 (1920)), *modified per curiam*, 490 F.2d 916 (5th Cir. 1974), there appears to be no encompassing doctrinal basis for determining when principals will be liable for the obligations of the corporations they control. At best, we can but list exemplars.[5] If a controlling stockholder uses

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4/ *Compare* Meiners, Mofsky & Tollison, *Piercing the Veil of Limited Liability*, 4 Del. J. Corp. L. 351, 352 (1979) (limited liability "has [no] significant impact at all") with Posner, *The Rights of Creditors of Affiliated Corporations*, 43 U.Chi.L.Rev. 499 (1976) (extolling the principle) and Landers, *A Unified Approach to Parent, Subsidiary, and Affiliate Questions in Bankruptcy*, 42 U.Chi.L.Rev. 589 (1975) (urging relaxation of the principle).

5/ The imposition of liability on a principal for the debts of the cor-

a closed corporation as his personal business conduit, he may be held responsible for the debts of his "alter ago." ***See, e. g., St. Paul Ins. Cos. v. Talladega Nursing Home, Inc.***, 606 F.2d 631, 635 & n.4 (5th Cir. 1979). A parent corporation may be held liable for the debts of a subsidiary if the parent fails to observe the formalities of separate incorporation, including adequate capitalization of the subsidiary. ***See, e. g., DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.***, 540 F.2d 681, 686 & n. 14 (collecting cases), 688–89 (4th Cir. 1976); ***Arnold v. Phillips***, 117 F.2d 497, 502 (5th Cir.), ***cert. denied***, 313 U.S. 583, 61 S. Ct. 1102, 85 L. Ed. 1539 (1941). If the corporation is employed to perpetrate a fraud upon a creditor, he may impose liability on its stockholders. ***See, e. g., FMC Fin. Corp. v. Murphree***, 632 F.2d 413, 423 (5th Cir. 1980); Posner, ***The Rights of Creditors of Affiliated Corporations***, 43 U.Chi.L.Rev. 499, 521 (1976). Finally, a principal (usually a parent company) may so dominate the activities of a corporation that it is necessary to treat the dominated corporation as an agent of the principal. ***See Krivo Indus. Supply Co. v. National Distillers & Chem. Corp.***, 483 F.2d 1098, 1102–03 (5th Cir. 1973), ***modified per curiam***, 490 F.2d 916 (5th Cir. 1974); ***Japan Petroleum Co. (Nigeria) Ltd. v. Ashland Oil, Inc.***, 456 F. Supp. 831, 838–41 (D. Del. 1978).

5/ **Continued.**

poration has been summed up by attractive metaphors like "piercing the corporate veil" and "holding a corporation liable for the acts of its alter ego." These gnomic phrases are used interchangeably, although literally they suggest different concepts. Moreover, they described results, but not the reasoning that leads to those results; they tell us nothing about the basis for imposition of liability. The use of such phrases as a basis for decision occasioned Cardozo's famous warning: "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." *Berkey v. Third Ave. Ry.*, 244 N.Y. 84, 94, 155 N. E. 58, 61 (1926).

Baker alleged 6/ and the jury found that Raymond exercised sufficient control of RSA to justify holding Raymond liable as Baker's actual Jones Act employer. Although the evidence might be sufficient to support this finding, we are unable to affirm it as a basis for imposing liability because the charge did not provide the jury with an adequate understanding of the factors to be considered in reaching it.

The court gave the following charge on this issue:

> A corporation which exercises actual control over another and operates the latter as a mere instrumentality or tool is liable for the obligations of the corporation it controls. In determining if such a relationship existed between the defendant and Raymond Saudi Arabia, you should consider the following factors:
>
> (1) Common stock ownership
> (2) Common directors or officers
> (3) Whether the defendant finances Raymond Saudi Arabia
> (4) Whether the defendant caused the incorporation of Raymond Saudi Arabia
> (5) Whether Raymond Saudi Arabia operates with grossly inadequate capital
> (6) Whether the defendant pays the salaries and other expenses or losses of Raymond Saudi Arabia
> (7) Whether Raymond Saudi Arabia receives any business except that given to it by the defendant
> (8) Whether the defendant uses Raymond Saudi Arabia's property as its own
> (9) Whether the directors and officers of Raymond Saudi

6/ The contention that Raymond was estopped to deny that it was Baker's employer, *see FMC Fin. Corp. v. Murphree*, 632 F.2d 413, 423 (5th Cir. 1980); Posner, *supra* note 4, at 520–23, was never advanced.

> Arabia act independently in the interest of that company, or whether they take their orders from the defendant and act in the defendant's interest.

Portions of the charge, particularly the opening paragraph, are substantially correct. However, the court failed to present adequately and in context the factors that might warrant the imposition of vicarious liability. The court should first have explained at least the rudiments of limited liability. Otherwise, jurors might believe, with the Raymond recruiter whom Baker encountered, that separate incorporation is important only for mysterious "tax purposes" and that the corporate form may otherwise be lightly disregarded. The jury should have been instructed that the stockholders in any adequately capitalized and legally operated corporation are immune from liability for its debts in the absence of the exceptional circumstances to be described by the court, and that the plaintiff bears the burden of proving that these circumstances exist.

[10, 11] The charge should then have accurately described to the jury the degree of control that must be found to establish that an ostensibly separate corporation is a mere instrumentality. Ownership of a controlling interest in a corporation entitles the controlling stockholder to exercise the normal incidents of stock ownership, such as the right to choose directors and set general policies, without forfeiting the protection of limited liability. *See Berger v. Columbia Broadcasting Sys., Inc.*, 453 F.2d 991, 994 (5th Cir.), *cert. denied*, 409 U.S. 848, 93 S. Ct. 54, 34 L.Ed.2d 89 (1972). To justify the extraordinary step of holding the dominant party liable, the jury must find that this control "amounts to total domination of the subservient corporation, to the extent that the subservient corporation manifests no separate corporate interests of its own and functions solely to achieve the purposes of the dominant corporation." *Krivo Indus. Supply Co. v. National Distillers & Chem. Corp.*, 483 F.2d 1098, 1106 (5th Cir. 1973), *modified per*

curiam, 490 F.2d 916 (5th Cir. 1974); *see* ***FMC Fin. Corp. v. Murphree***, 632 F.2d 413, 422 & n. 8 (5th Cir. 1980); ***Japan Petroleum Co. (Nigeria) Ltd. v. Ashland Oil, Inc.***, 456 F. Supp. 831, 841 (D. Del. 1978) ("the control must be actual, participatory, and total").

The court might then have properly charged the jury that, in deciding whether Raymond exercised total domination over RSA, it might consider the nine factors cited by the court.[7] The jury should have been instructed that no one of these factors is dispositive and that the list does not exhaust the relevant factors.

Finally, in the light of Raymond's complicated relationship with RSA, the court should have elaborated the significance of the first factor, ownership of stock. Raymond owns no RSA stock in its own name. 50% of RSA stock is owned in the name of Raymond International of Delaware, Inc. (Raymond Delaware), a wholly owned subsidiary of Raymond. The remaining 50% is owned by Saudi Arabian princes and corporations. Although the presence or absence of stock ownership in the allegedly dominated corporation is only one factor among many, *see* ***Krivo Indus. Supply Co. v. National Distillers & Chem. Corp.***, 483 F.2d 1098, 1104 (5th Cir. 1973), ***modified per curaim***, 490 F.2d 916 (5th Cir. 1974), the jury should have been informed that, in theory, the legal right to control RSA is shared by Raymond Delaware and the Saudi Arabian princes and corporations, although Raymond could have in fact exercised that right through its ownership of Raymond Delaware.

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[7] The reliance on these factors by the factfinder in a bench trial was approved in *Bay Sound Transp. Co. v. United States*, 474 F.2d 1397 (5th Cir. 1973) (per curiam), *aff'g* 350 F. Supp. 420 (S. D. Tex. 1972), *cert. denied*, 415 U.S. 916, 94 S. Ct. 1413, 39 L. Ed.2d 471 (1974). These factors were initially set forth in *Taylor v. Standard Gas & Elec. Co.*, 96 F.2d 693, 704–05 (10th Cir. 1938) (quoting *Powell on Parent and Subsidiary Corporations*), *rev'd on other grounds*, 306 U. S. 307, 59 S. Ct. 543, 83 L. Ed. 669 (1939).

[12] The jury's finding of vicarious liability is vacated. Because, as we discuss in Part IV, Baker's right to maintenance, cure, and wages to the end of the voyage depends on his establishing an employment relationship, we remand for a new trial on the issue.

III. Responsibility for the Vessel

[13,14] Both ship and shipowner are liable to seamen for injuries caused by unseaworthiness. *The Osceola*, 189 U. S. 158, 175, 23 S. Ct. 483, 487, 47 L. Ed. 760, 764 (1903); *see Gilmore & Black, supra*, §§ 6–38 to –44. The duty to provide a seaworthy vessel is absolute and extends not only to the owner's employees but to all who do seaman's work. *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946). 8/ This duty is commonly called a warranty of seaworthiness, not because it is a warranty, but because it is a species of liability without fault and the duty is an "absolute, continuing, and nondelegable" incident of vessel ownership. *Allen v. Seacoast Prods., Inc.*, 623 F.2d 355, 364 (5th Cir. 1980). To be held liable for breach of the duty, the defendant "must be in the relationship of an owner or operator of a vessel." *Daniels v. Florida Power & Light Co.*, 317 F.2d 41, 43 (5th Cir.) *cert. denied*, 375 U.S. 832, 84 S. Ct. 78, 11 L. Ed. 2d 63 (1963). A bareboat or demise charter (hereinafter called a bareboat charter), whereby the charterer assumes "full possession and control of the vessel," *Reed v. Steamship Yaka*, 373 U.S. 410, 412, 83 S. Ct. 1349, 1351, 10 L. Ed. 2d 448 (1963), constitutes the only form of charter that purports to invest

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8/ No libel in rem has been asserted against the *Loretta*; we consider only the claim for personal liability against Raymond as its owner. The case does not, therefore, present the question whether there can be in rem liability if the owner is not liable in personam, decided by us in *Grigsby v. Coastal Marine Serv.*, 412 F.2d 1011, 1023–29 (5th Cir. 1969), *cert. denied*, 396 U.S. 1033, 90 S. Ct. 612, 24 L. Ed. 2d 531 (1970).

temporary powers of ownership in the charterer 9/ and, therefore, constitutes the only conceivable basis on which the vessel owner could seek to escape liability for the unseaworthiness of his vessel. *See Guzman v. Pichirilo*, 369 U.S. 698, 82 S. Ct. 1095, 8 L. Ed.2d 205 (1962); *Kerr-McGee Corp. v. Law*, 479 F.2d 61, 63 (4th Cir. 1973); *Solet v. M/V Capt. H. V. Dufrene*, 303 F. Supp. 980, 983–85 (E. D. La. 1969).

Baker's recovery was also predicated on the ground that Raymond was liable for the unseaworthiness of the *Loretta*. Raymond does not challenge the jury's finding that the vessel was unseaworthy. It contends, instead, that, because it had relinquished control of the *Loretta* to RSA, it did not owe Baker the duty to provide him a seaworthy vessel. We conclude that Raymond could not make a valid bareboat charter relinquishing control to RSA and that even such a charter would not have released it from its liability as owner for the unseaworthiness of its vessel. We affirm the jury's award of compensatory damages on this basis.

In addition to his comments on the Jones Act claim, on the morning the trial began, the trial judge said he would not consider Raymond's argument because a charter to a noncitizen of the United States sufficient to relieve the owner of control was inferentially prohibited by regulation of the Department of Commerce, Maritime Administration. 10/

9/ The charterer is described as the "owner *pro hac vice*." *See, e. g., Reed v. Steamship Yaka*, 373 U.S. 410, 412, 83 S. Ct. 1349, 1352, 10 L. Ed.2d 448, 451 (1963).

10/ 46 C.F.R. §221.7(a) (1981) provides in pertinent part:
The Department of Commerce, Maritime Administration, hereby approves under sections 9, 37 and 41 of the Shipping Act, 1916, as amended (46 U.S.C. 808, 835 and 839), the charter to a person not a citizen of the United States of any vessel (including space in such vessel) documented under the laws of the United States, or the last

[15] Because the Maritime Administration has prohibited "demise or bareboat charters" to aliens, Raymond cannot escape liability for the *Loretta's* unseaworthiness. Any attempted bareboat charter between Raymond and RSA was void ab initio; a court cannot enforce an illegal contract to the detriment of an innocent third party. *See Tampa Elec. Co. v. Nashville Coal Co.*, 276 F.2d 766, 773 (6th Cir. 1960), *rev'd on other grounds*, 365 U.S. 320, 81 S. Ct. 623, 5 L. Ed.2d 580 (1961); J. Murray, Murray on Contracts §§344, 346, 347 (2d rev.ed. 1974).

[16] Raymond argues alternatively that, mutatis mutandis, the fact that RSA had complete possession and control of the *Loretta* absolves Raymond of liability. There is no support for this thesis that the mere surrender of control of a vessel absolves its owner. If a shield is possible, it can be provided only by a valid bareboat charter. "[A]nything short of . . . a complete transfer is a time or voyage charter party or not a charter party at all"; the owner remains liable for unseaworthiness. *Guzman v. Pichirilo*, 369 U.S. 698, 700, 82 S. Ct. 1095, 1096, 8 L. Ed.2d 205, 208 (1962). An invalid transfer is scarcely a complete one.

[17] We need not rest our decision on the applicability of the regulation. Even assuming, arguendo, that there was a bareboat charter to RSA, we conclude that it would not have absolved the vessel owner of liability for the vessel's unseaworthiness.

10/ Continued

documentation of which was under the laws of the United States, or by a corporation organized under the laws of the United States or of any State, Territory, District or possession thereof. In general, as to each vessel, the approval shall extend for a period of not more than six (6) months, or for a voyage or voyages that will probably terminate before the expiration of six months . . . . Approval will not be granted to charters of the following nature:

(1) Demise or bareboat charters.

The Supreme Court has twice avoided deciding whether a bareboat charter relieves the owner of liability for unseaworthiness. *See Reed v. Steamship Yaka*, 373 U.S. 410, 411 n.1, 83 S. Ct. 1349, 1351 n. 1, 10 L. Ed.2d 448, 450 n. 1 (1963); *Guzman v. Pichirilo*, 369 U.S. 698, 700, 82 S. Ct. 1095, 1096, 8 L. Ed.2d 205, 208 (1962). The lower courts have generally agreed that, after control of the vessel is turned over to the charterer, the owner remains liable for injuries caused by defects in the vessel that existed before the commencement of the charter. 11/ In several instances, assuming the answer to the question now directly raised, courts have, however, stated that delivery of the vessel to a bareboat charterer terminates the owner's liability for conditions that arise only thereafter. 12/

11/ *See Nat G. Harrison Overseas Corp. v. American Tug Titan*, 516 F. 2d 89, 96 (5th Cir.), *modified per curiam*, 520 F.2d 1104 (1975); *Hamilton v. Canal Barge Co.*, 395 F. Supp. 978, 988 (E. D. La. 1975); *Solet v. M/V Capt. H. V. Dufrene* 303 F. Supp. 980, 984 (E. D. La. 1969).

12/ *See Nat G. Harrison Overseas Corp. v. American Tug Titan*, 516 F.2d 89, 96 (5th Cir.), *modified per curiam*, 520 F.2d 1104 (1975) (dictum); *Kerr-McGee Corp. v. Law*, 479 F.2d 61, 63 (4th Cir. 1973); *In re Marine Sulphur Queen*, 460 F.2d 89, 100 (2d Cir.), *cert. denied*, 409 U.S. 982, 93 S. Ct. 318, 34 L. Ed.2d 246 (1972); Ramos v. Beauregard, Inc., 423 F.2d 916, 917–18 (1st Cir.), *cert. denied*, 400 U.S. 865, 91 S. Ct. 101, 27 L. Ed. 2d 104 (1970); *Haskins v. Point Towing Co.*, 421 F.2d 532, 536(3d Cir.), *cert. denied*, 400 U.S. 834, 91 S. Ct. 68, 27 L. Ed.2d 66 (1970); *Cannella v. Lykes Bros. S. S. Co.*, 174 F.2d 794, 795 (2d Cir.) (L. Hand, J.), *cert. denied*, 338 U.S. 859, 70 S. Ct. 102, 94 L. Ed. 526 (1949).
In *Nat G. Harrison Overseas Corp. v. American Tug Titan*, the panel noted two cases limiting the owner's liability to defects arising before delivery, calling them "a fair statement of the law," 516 F.2d at 96, but decided its case on the basis that the defects alleged had all arisen before the date of delivery. Consequently, we are not bound by this dicta. The issue has also been discussed, though not decided, in *Grigsby v. Coastal Marine Serv.*, 412 F.2d 1011, 1030–31 (5th Cir. 1969), *cert. denied*, 396 U. S. 1033, 90 S. Ct. 612, 24 L. Ed.2d 531 (1970).

The origin of these distinctions lies in 19th century doctrine concerning civil liability. Liability in contract was based on privity and in tort on subjective fault or negligence. *Gilmore & Black, supra,* §9–18(a), at 621; W. Prosser, *Handbook of the Law of Torts* §§ 92–93 (4th ed. 1971). This development was influenced by the political and economic need to encourage enterprise. 13/ If a vessel owner turned over a seaworthy vessel to a bareboat charterer, and thereafter the charterer incurred additional obligations or caused injury, contemporary thought held that the faultless shipowner should not be liable. The blameworthy charterer, however, often proved to be insolvent. If truly innocent third persons were to be protected against harm inflicted as a result of the vessel's operation, it was necessary to reach the owner's purse. At the dawn of this century, therefore, in dictum "of the most authoritative kind," 14/ the Supreme Court modified 19th century doctrine. *In The Barnstable,* 181 U. S. 464, 21 S. Ct. 684, 45 L. Ed. 954 (1901), the Court stated that a vessel is liable in rem for damage done by it in the control of charterers. The court cited as authority in part for this observation its earlier decision in *The China,* 74 U.S. (7Wall.) 53, 19 L. Ed. 67 (1869), holding a foreign vessel liable in rem for damage to a domestic vessel resulting from a collision caused by a compulsory pilot's negligence.

These decisions improvised a pragmatic economic solution to the problem of risk allocation. The injured third person was not confined to exploring the potentially empty purse of the charterer but could secure redress by affixing a lien to the vessel. In an effort to fit this jerry-built remedy into comfortable legal doctrine, courts and commentators spun the fiction of personification of the ship; it is the vessel that is liable in these circumstances. *See Gilmore & Black, supra,* §§9–4, –18.

13/ *See generally M. Horwitz, The Transformation of American Law,* 1780-1860 (1977).

14/ *Gilmore & Black, supra,* § 9–10, at 601.

The personification theory did not, however, weather all legal storms. In many situations, "the vessel" was not held liable for claims against its charterer-possessor. Liens were not indelible; they were not enforced against good faith purchasers without notice. "[T]he fiction of ship's personality," according to Professors Gilmore and Black, "has never been much more than a literary theme," now fallen into disrepute. *Id.* § 9–18, at 616. More recently, in *Reed v. Steamship Yaka*, 373 U.S. 410, 83 S. Ct. 1349, 10 L.Ed.2d 448 (1963), the Court held that a vessel remained liable in rem for unseaworthiness arising after delivery to a bareboat charterer, in part as a means of avoiding the decision we make today. *See Grigsby v. Coastal Marine Serv.*, 412 F.2d 1011, 1031 (5th Cir. 1969), *cert. denied*, 346 U.S. 1033, 90 S. Ct. 612, 24 L.Ed.2d 531 (1970); *Solet v. M/V Capt. H. V. Dufrene*, 303 F. Supp. 980, 985 (E.D.La.1969). The Court thus continued its attempt to accommodate the notion that the owner should not be held liable for faults beyond his control with the recognition that a seaman may have no recourse against the judgment-proof charterer. *See Gilmore & Black, supra*, § 9–18(a), at 621.

This accommodation is no longer needed. Admiralty, like common law, now imposes liability without fault. The exuberant development of strict liability for unseaworthiness is but one example. *See Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 80 S. Ct. 926, 4 L.Ed.2d 941 (1960); *Boudoin v. Lykes Bros. S. S. Co.*, 348 U.S. 336, 75 S. Ct. 382, 99 L.Ed. 354 (1955). With Professors Gilmore and Black, *Gilmore & Black, supra*, §9–18(a), at 622, we now see no useful purpose served by restricting seamen to a remedy in rem as the sole means of holding the owner liable. The restriction functions, instead, only as a pleading trap for the unwary and as a purely fortuitous means whereby an owner may escape liability if his vessel is beyond the court's jurisdiction.

As a matter of policy, we treat seamen protectively, as "wards of admiralty." *U. S. Bulk Carriers, Inc. v. Arguelles*,

400 U.S. 351, 355, 91 S. Ct. 409, 411, 27 L.Ed.2d 456, 461 (1971); *Robertson v. Baldwin*, 165 U.S. 275, 287, 17 S.Ct. 326, 331, 41 L.Ed. 715, 719 (1897). In *Spinks v. Chevron Oil Co.*, 507 F.2d 216 (5th Cir. 1975), we followed this policy and held it no longer necessary "that an injured seaman. . . . speculate at his peril" on the identity of his Jones Act employer. *Id.* at 225. Similarly, an injured seaman, of presumably limited resources, should not have to speculate on when the unseaworthy condition of a vessel arose or whether a valid bareboat charter existed. No continuing purpose is accomplished by requiring him to seek out and attach the vessel. If injured by its unseaworthiness, he should be able to sue its owner. The allocation of ultimate liability should be the responsibility of the owner and charterer, who "can sort out which between them will bear the final cost of recovery." *Id.*

[18] We make explicit what was implicit in *The Barnstable:* a seaman may have recourse in personam against the owner of an unseaworthy vessel, without regard to whether owner or bareboat charterer is responsible for the vessel's condition. This personal liability is not, of course, unlimited. It is subject to the ceiling established by the Limitation Act, 46 U.S.C. §183(a). If the vessel's unseaworthiness is not the result of the owner's knowledge or privity, his total actual exposure may be limited to the value of the vessel.

We hold that Raymond was liable for the unseaworthiness of the barge. This liability is sufficient, in itself, to support the jury's award of damages compensating the injuries suffered by Baker. That award is affirmed.

IV. Failure To Pay Maintenance, Cure, and Wages to the End of the Voyage

Baker also sought to recover damages from Raymond for its allegedly arbitrary failure to pay him maintenance, cure, and wages to the end of the voyage. The jury awarded him $12 a

day for maintenance, $31,700 for cure, $28,488 in wages to the end of the voyage, and $370,188 in damages resulting from Raymond's "arbitrary and unreasonable" failure to pay maintenance, cure, and wages; it also awarded him attorney's fees in what the jury called "the customary amount or as agreed between plaintiff and his attorney." The court entered judgment on the compensatory awards, but granted Raymond's motion for judgment notwithstanding the verdict, nullifying the jury's award of damages and attorney's fees for Raymond's "arbitrary and unreasonable" failure to pay maintenance, cure, and wages. The judgment provided that, in the event of reversal on appeal, Raymond's motion for a new trial on this issue was granted.

[19] The seaman's right to maintenance, cure, and wages to the end of the voyage all stem from the same root. ***Flunker v. United States,*** 528 F.2d 239, 242 (9th Cir. 1975); ***Isthmian Lines, Inc. v. Haire,*** 334 F.2d 521, 523 (5th Cir. 1964); ***see Vickers v. Tumey,*** 290 F.2d 426 (5th Cir. 1961); ***Gilmore & Black, supra,*** § 6–12. Although an injured seaman's right to these forms of support is implied by law, it "arises out of the contract of employment." ***Tate v. American Tugs, Inc.,*** 634 F.2d 869, 870 (5th Cir. 1981); ***see Vaughan v. Atkinson,*** 369 U.S. 527, 532–33, 82 S. Ct. 997, 1000–01, 8 L.Ed.2d 88, 92–93 (1962); ***Cortes v. Baltimore Insular Line, Inc.,*** 287 U.S. 367, 371, 53 S.Ct. 173, 174, 77 L.Ed. 368, 371 (1932); ***McCorpen v. Central Gulf S.S. Corp.,*** 396 F.2d 547, 548 (5th Cir.), ***cert. denied,*** 393 U.S. 894, 89 S. Ct. 223, 21 L.Ed. 2d 175 (1968); ***Gilmore & Black, supra,*** §6–7, at 285. Wages are the quintessential obligation of an employer to his employee. Consequently, seamen will ordinarily look to their employer for these compensatory payments.

[20] In addition, seamen may sue in rem to recover maintenance, cure, and wages to the end of the voyage. ***The Osceola,*** 189 U.S. 158, 175, 23 S.Ct. 483, 487, 47 L.Ed. 760, 764 (1903); ***Solet v. M/V Capt. H. V. Dufrene,*** 303 F. Supp.

980, 987 (E.D.La. 1969); *Gilmore & Black, supra*, §6–7, at 284–87. The right to sue in rem "arises from 'the peculiar relationship existing between the seaman and his vessel,' " *Solet v. M/V Capt. H. V. Dufrene*, 303 F. Supp. at 987 (quoting 1 M. Norris, *Seamen* 592 (2d ed. 1962)), not on the theory that the vessel owner owes these duties by virtue of his ownership. Maintenance, cure, and wages remain, however, the particular responsibility of the employer, unlike the liability for unseaworthiness, which arises directly from ownership of the vessel. The liability is an amount usually far more modest, and, in the typical case, the seaman is required to look no further than the desk at which he signed articles to locate his employer. Neither policy nor precedent permits a seaman to sue a nonemploying owner in personam for maintenance, cure, and wages, and nothing in this case constrains us to reexamine them.

[21] Baker has not sued the *Loretta* in rem. We have reversed the jury's finding that Raymond was Baker's employer under the borrowed servant doctrine and vacated the jury's finding that RSA, Baker's nominal employer, is the instrumentality of Raymond. Because we are left with no finding establishing Raymond as Baker's employer, we vacate the awards of maintenance, cure, and wages to the end of the voyage, and remand for a new trial on Baker's claim that the court should treat Raymond as Baker's employer.

V. Summary

The jury's award of compensatory damages to Glenn Baker is AFFIRMED, though solely on the ground that Raymond International, Inc., was liable for the unseaworthiness of its barge, the *Loretta*.

The jury's award of maintenance, cure, and wages to the end of the voyage is VACATED, as is the judgment notwithstanding the verdict as to damages resulting from Raymond

International's failure to pay these items. The cause is REMANDED for a new trial to determine whether Raymond International must be treated as Glenn Baker's employer.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT *

UNIT A

NO. 80-3019

GLENN PAUL BAKER, SR.,
Plaintiff-Appellee,
Cross-Appellant,

versus

RAYMOND INTERNATIONAL, INC.,
Defendant-Appellant,
Cross-Appellee.

Appeals from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion September 14, 1981, 5 Cir., 1981, _____ F.2d _____).

(November 2, 1981)

Before SKELTON**, Senior Judge and RUBIN and REAVLEY, Circuit Judges.

---

*Former Fifth Circuit case, Section 9(1) of Public Law 96-452 October 14, 1980.

**Senior Judge of the U.S. Court of Claims, sitting by designation.

PER CURIAM:

The opinion is amended to add the following at the end of footnote 10:

> The regulation in force prior to March 1, 1977, permitted application to be made for a bare-boat charter of a vessel to a foreign citizen or corporation. The record contains no evidence concerning when the alleged verbal charter was entered into and no suggestion that it was approved.

The petition for rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/Rubin
United States Circuit Judge

APPENDIX C

TEXT OF REGULATION INVOLVED

Before March 1, 1977, 46 CFR 221.7(a) read:

> (a) The Department of Commerce, Maritime Administration, hereby approves under sections 9 and 37 of the Shipping Act, 1916, as amended (52 Stat. 964; 40 Stat. 901; 46 U.S.C. 808 and 835) the charter to a person not a citizen of the United States of any vessel (including space in such vessel) documented under the laws of the United States, or the last documentation of which was under the laws of the United States, or owned in whole or in part by any person a citizen of the United States, or by a corporation organized under the laws of the United States or of any State, Territory, District or possession thereof, for a period of not more than six (6) months, or for a voyage or voyages the duration of which will probably not exceed six (6) months, except:
>
> (1) Demise or bareboat charters.

Opposition

Supreme Court, U.S.
FILED
APR 23 1982
ALEXANDER L. STEVAS
CLERK

NO. 81-1448

In the Supreme Court of the United States

OCTOBER TERM, 1981

RAYMOND INTERNATIONAL, INC.
Petitioner

VERSUS

GLENN PAUL BAKER, SR.,
Respondent

RESPONSE TO PETITION FOR CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES

NO. 81-1448

RAYMOND INTERNATIONAL, INC.
Petitioner,

versus

GLENN PAUL BAKER, SR.,
Respondent.

RESPONSE TO PETITION FOR CERTIORARI

MAY IT PLEASE THE COURT:

SUMMARY OF REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE GRANTED IN THIS CASE

In the petition for a writ of certiorari the petitioner states the following question as the question presented for review:

> "May a vessel owner be strictly liable in personam for an unseaworthy condition which arose after its vessel was delivered to another under bareboat charter?"

A writ of certiorari should not be granted in this case because:

A. The issue which in the petition for writ of certiorari is said to be presented is not truly before the court as is seen by:

1. As a factual matter there was no bareboat charter in existence and thus the question which in the petition is said to be presented for review is not reached, and;

2. The facts of this case (relative to the control and involvement of the owner through the time of the accident) are such that even if there had been a bareboat charter the law relative to whether a vessel owner is liable for an unseaworthy condition arising after the inception of the charter would not be brought clearly into focus; any ruling from this case would be distinguishable in further cases.

3. The vessel was unseaworthy at a time prior to the time which petitioner suggests that a bareboat charter came into existence and this unseaworthiness continued through the time of the accident, and thus the question which the petitioner states is for review does not come into play; and

4. The decision of the Court of Appeal was not based upon the question which the petitioner states is presented for review. The appellate Court's treatment of the law relative to what the law would be if there had been a bareboat charter and if the unseaworthy condition had arisen only after such a charter is expressly set forth in hypothetical (acknowledged dicta) term

B. The Court of Appeals in its treatment of the issue correctly stated the law relative to whether a vessel owner can be liable in personam for an unseaworthy condition which arose after its vessel was delivered to another under a bareboat charter.

STATEMENT OF THE FACTS

The accident at issue occurred on September 10, 1978, aboard Raymond International, Inc.'s self-propelled jack-up barge "LORETTA" while she was working in the Persian (sometimes called Arabian) Gulf on a job which consisted of constructing a pipeline trestle.

In January, 1978, Raymond International, Inc. began outfitting the "LORETTA" for the job, and she sailed from Houston, Texas to the Persian Gulf in May, 1978.

On June, 1978, the plaintiff became employed for the project.

As stated by the Court of Appeal:

> "Baker's trip to the Persian Gulf began when, unemployed after working in the North Sea, he responded to a Raymond International, Inc. newspaper advertisement in a New Orleans newspaper, the Times Picayune, offering marine construction workers employment in Saudi Arabia. The advertisement stated: 'We are currently recruiting for a number of skilled craft personnel to work on *our* LPG pipeline trestle in the Arabian Gulf'. Another Raymond advertisement stated: 'Positions continue to open up on *our* piling trestle in the Arabian Gulf'. Applicants were invited to send a resume to Manager, Foreign Recruiting, Raymond International, Inc. or to Gene La Grose or Herb Morgan at Raymond International, Inc.'s office in Houston, where he was interviewed by a Raymond International, Inc. employee and accepted for employment. (Emphasis added)

After taking a physical examination, Baker signed an employment contract in Raymond International, Inc.'s office. This contract stated that he was employed by Raymond Saudi Arabia, Ltd., and was signed by a representative of Raymond Saudi Arabia, Ltd. The person who signed the contract for Raymond Saudi Arabia, Ltd., however, was a Raymond International, Inc. employee. Baker testified that the employee who explained the contract to him told him that Raymond International, Inc. and Raymond Saudi Arabia, Ltd. were the same company and that the difference in names was only for 'tax purposes'.

On the same day, a Raymond International Inc. employee gave Baker a form for claiming income tax benefits while employed abroad. This form, filled in by a Raymond International, Inc. employee for Baker, stated: 'I am employed by Raymond International, Inc.' Baker also signed a life insurance beneficiary designation, filled in by a Raymond International, Inc. employee

stating that his employer was Raymond International, Inc.

Baker transported to Saudi Arabia and began work. He received a monthly pay sheet stamped with Raymond International, Inc.'s logo, the letters RI superimposed on a globe, which had also appeared on each of the newspaper advertisements.

A trestle extending seven miles into the Persian Gulf was being built pursuant to a contract between Raymond Saudi Arabia, Ltd. and the Arabian American Oil Company (Aramco). Baker was assigned to this project, working aboard the pile-driving barge "LORETTA", which belonged to Raymond International, Inc. as a pile driver rigger. In September, together with other workers, he was engaged in repairing the barge when he was injured." (656 F.2d at 176).

The Court also noted:

"There was other evidence that Raymond International, Inc. considered the trestle job as its project. Its annual

> report to its stockholders carried a photograph of the trestle, referred to the project as 'our' trestle job, and stated that Raymond International, Inc. was doing the work. The report does not mention Raymond Saudi Arabia, Ltd. There was also other evidence of corporate affinity: Raymond International, Inc. maintained personnel files on employees of Raymond Saudi Arabia, Ltd. and the chief executive officer of Rfaymond Saudi Arabia, Ltd. was an employee of another Raymond International, Inc. affiliate, Raymond International United Kingdom." (Quoted from footnote 3 of the opinion).

As of the time of the accident, documents which Raymond International, Inc. had on file with the United States Coast Guard designated H.A. Fadere, a full time vice president of Raymond Inte:¬ational, Inc., as the master of the vessel. These documents (which were filed by Raymond International, Inc. *after* the "LORETTA" was destined by it for the trestle job) include not only the certificate of registry, but the master's oath which was signed by Mr. Fadere (see plaintiff's exhibits No. 14 and 15, discussed at TR Vol. IV, pg. 73-75).

The facts with respect to the cause and occurrence of the accident are largely uncontroverted.

The pile-driving vessel "LORETTA" was a self-propelled jack-up barge. The "legs" upon which the barge could be jacked up were long columns approximately six feet in diameter. These columns fit through hollow cylinders placed vertically through the hull. The top of each cylinder was about fifteen feet higher than the deck of the barge. Within each cylinder were steel plated, each weighing between two hundred and three hundred pounds and each being approximately one inch thick by twenty-four inches by thirty inches (TR Vol. III, pg. 37). There were thirty-two plates to a cylinder. The cylinder is sometimes referred to as the "jack hole". It is through pressure applied to the plates from within the barge that the jacking up or jacking down of the legs of the barge is accomplished.

The plates needed repair and so the vessel's crew had taken the leg out of the jack hole and had removed the plates needing repair. The return of the repaired plates back to the jack hole was the work being accomplished at the time of the accident.

The pile-driving riggers took turns working down in the jack hole. At the time of the accident, Baker was in the jack hole standing on a scaffold board about fifteen feet below the top rim of the jack hole. Plywood and grating had been placed across the very bottom of the jack hole so as to prevent anything from falling out and into the water below. While Baker was leaning over to pick up a pair of pliers, the steel plate which was being brought by crane to the jack hole bumped (leaving a small gash) (TR Vol. III,

pg. 43) on the inside of the jack hole cylinder at the top, knocking the plate out of its cable bridle. The plate hit Baker on the head, and fell on down the jack hole. Baker was knocked to the grating at the bottom.

The crane involved was the vessel crane. This is a giant crane which has a boom approximately two hundred feet long. The crane rotates on a steel ring which is thirty feet in diameter (TR Vol. III, pg. 63). This crane rotates upon this ring by way of wheels which are about fourteen inches in diameter and are lipped on each side. They are similar to railroad car wheels (TR Vol. III, pg. 62). These wheels were "out of round"-- they had flat areas on them (TR Vol. III, pg. 65). This caused the crane boom to sway (TR Vol. pg. 65). Moreover, the ring upon which the wheels rolled had "low spots in it" (TR Vol. III, pg. 77). When the boom was noved sideways, there was a "rollercoaster movement" (TR Vol. III, pg. 77). When the operator wanted the boom to stop, it kept on going for two or three feet and would then roll back and forth, swaying if one of the low spots was involved in the stopping point (TR Vol. III, pg. 77).

Some of the rollers (objects shaped like rolling pins which were about three inches in diameter and about four or five feet long and which were fixed horizontally at

---

, Baker sustained permanent brain damage, among other injuries, as a result of the accident. Raymond has paid him *only* 1½ month's salary since the accident! It has not even paid the $31,700.00 in future medical expenses awarded by the jury nor *any* weekly money; Raymond takes the position that Baker must go to Saudi Arabia to sue Raymond Saudi Arabia, Ltd. there.

various locations within the crane boom so that the crane boom cable would roll on the rollers and not rub against the boom fixed structure) were missing. In the places where those rollers were missing, the cables had cut slits (sometimes referred to as crevices) into the structure. These slits were the width of the cable and about two inches deep (TR Vol. III, pg. 74). These caused the cable to fray, and when frayed areas would catch in the narrowness of the slit the cable would jerk. The rollers which were missing had *never been installed* on the crane boom as evidenced by the fact that the holes for the rollers had never been used (TR Vol. III, pg. 73).

As indicated previously, the above facts were not controverted. The jury's finding relative to unseaworthiness of the vessel is certainly supported and mandated by the evidence.

ARGUMENT

THE ISSUE WHICH IN THE PETITION FOR WRIT OF CERTIORARI IS SAID TO BE PRESENTED, IS NOT TRULY BEFORE THE COURT AS IS SEEN BY:

AS A FACTUAL MATTER THERE WAS NO BAREBOAT CHARTER IN EXISTENCE AND THUS THE QUESTION WHICH IN THE PETITION IS SAID TO BE PRESENTED FOR REVIEW IS NOT REACHED.

There was no bareboat charter. As will be detailed below, there was no written charter agreement, the facts negate any contentions that there was a bareboat charter, the law is that there was no bareboat charter in light of the facts, there was no contractual relationships between the owner and the alleged bareboat charterer and thus there could not have been a bareboat charter. The appellate decision in this case is based on its holding that there was no bareboat charter.

As stated by the Court of Appeals in the instant case:

> "A bareboat or demise charter,[2] (hereinafter called a bareboat charter), whereby the charterer assumes 'full possession and control of the vessel' Reed v. Steamship Yaka, 373 U.S. 410, 412 83 S.Ct. 1349, 1351, 10 L.Ed 2d 448 (1963), constitutes the only form of charter that purports to invest temporary powers of ownership in the charterer. . .

---

[2] Sometimes a bareboat charter is referred to as a demise. The terms are interchangeable. See, e.g., the opinion in the Court below, 565 F. 2d at 182.

> If a shield is possible, it can be provided only by a valid bareboat charter. '[A]nything short of. . . a complete transfer is a time or voyage charter party or not a charter party at all'; Guzman v. Pichirilo, 369 U.S. 698, 700, 82 S.Ct. 1095, 1096, 8 L.Ed 2d 205, 208 (1962)" (656 F.2d at 182)

This court in *Guzman v. Pichirilo*, 369 U.S. 698, 8 L.Ed., 2d 205, 82 S.Ct. 1095 (1962), made it clear that in order for there to be a bareboat charter the owner of the vessel must *completely and exclusively* relinquish possession, command and navigation of the vessel to the demisee and that this relinquishment must be *tantamount to an outright transfer of ownership*, and that anything short of such a complete transfer is a time or voyage charter (as distinct from a bareboat charter) or not a bareboat charter at all.

This court went on to rule that an owner who attempts to escape his normal liability for the unseaworthiness of his vessel on the ground that he has temporarily been relieved of this obligation has the burden of establishing the facts that might give rise to such relief, assuming arguendo that a bareboat charter would isolate the owner from liability, and the owner would have the burden of showing such a charter. This court went on to say that such a burden is heavy because the courts are reluctant to

find a bareboat charter when the dealings between the parties are consistent with any lesser relationship.[3]

This court in *Guzman v. Pichirilo* stated:

> To create a demise the owner of the vessel must completely and exclusively relinquish 'possession, command and navigation' thereof to the demisee. United States v. Shea, 152 U.S. 178, 38 L.Ed. 403, 14 S.Ct. 519 (1894); Leary v. United States (US) 14 Wall 607, 20 L.Ed. 756 (1872); Reed v. United States (US) 11 Wall 591, 20 L.Ed. 220 (1871). See generally Gilmore & Black, The Law of Admiralty, 215-219; Robinson, Admiralty, 593-601; Scrutton, Charterparties (16th ed, McNair & Mocatta), *4-7. *[369 US 700]. It is therefore tantamount to, though just short of, an outright transfer of ownership. However, anything short of such a complete transfer is a time or voyage charter party or not a charter party at all. While a demise may bring about a change in the respective legal obligations of the owner and demisee, ibid., we need not decide here whether it relieves the

[3] This court further noted, in footnote 4 to its decision in *Guzman*, that its view of the case makes it unnecessary to determine whether a bareboat charter can be created without a written document.

> owner of his traditional duty to maintain a seaworthy vessel, for under our view of the record the trial court's determination that there was no demise charter party must stand.
>
> The owner who attempts to escape his normal liability for the unseaworthiness of his vessel on the ground that he has temporarily been relieved of his obligation has the burden of establishing the facts which give rise to such relief. Thus, assuming arguendo that a demise charter party would isolate the owner from liability, the owner has the burden of showing such a charter. This burden is heavy, for courts are reluctant to find a demise when the dealings between the parties are consistent with any lesser relationship." (369 U.S. 698, 700, 82 S.Ct. 1095, 1096, 8 L.Ed. 2d 205, 208).

Under the law as set forth above there certainly could not have been a bareboat charter in the instant case.

Counsel for Raymond International, Inc. admitted at the outset of the trial that there was no written charter. The transcript of the conversation between counsel and the court in the Judge's chambers before the jury selection reflects:

"I also understand that there is no written bareboat charter either.
MR. SMITH:
That's correct." (Vol. 3, p.4, line 17-20)

The facts negate any contentions that there was a bareboat charter. Raymond International, Inc. absolutely did not turn over its jack-up barge to be used on any project or navigation that the whim of the recipient of the barge might dictate.

There was not a relinquishment of possession, control and navigation of that jack-up barge. Raymond International, Inc. destined the barge "LORETTA" in January, 1978 for the trestle job in Saudi Arabia (See testimony of Raymond International, Inc.'s project manager, Vol. 4, p. 42). *After* that barge was destined for Raymond International, Inc.'s trestle job, Raymond International, Inc. went to the United States Coast Guard office at the home port of the vessel, Houston, Texas, and filed documentation designating one of its vice presidents as the master of the vessel! (See plaintiff's exhibit 15, "Master's Oath On Registry, License Or Enrollment And License) Raymond International, Inc. maintained, its vice president as official vessel master of the "LORETTA" through the time of the accident and in fact through the time of the trial.

*See also the following deposition testimony of Stanley Walker, U.S. Coast Guard documentation officer at Houston, Texas:

"A. Our record shows it's been ported in Houston since February 24, 1976.
Q. You're referring to the Abstract of Title that you have now retrieved out of the records. Is that correct?
A. That's correct.
Q. Are these records officially kept here?

[4]Footnote cont.

A. Yes, sir.

Q. From the documents that you have in your files, can you tell us whether or not the barge LORETTA is a documented vessel of the United States?

A. Yes, sir. It is.

Q. All right. Could you please refer to the Certificate of Registry? Is that document in your file?

A. A copy; the original should be on the vessel.

Q. All right, sir. But you have an official copy that remains in your file?

A. Yes, sir.

Q. What is the date of that Certificate of Registry?

A. February 23, 1978.

Q. Who is designated on that registry certificate as the present master of the vessel?

A. May I explain something here?

Q. Yes please.

A. On this registry certificate, Mr. Federa, who took the oath, is; but if you've changed masters at any time, we would then register it not on here but on our file card.

Q. All right.

A. And the file card still shows Mr. Federa as the master.

Q. His full name please is?

A. H.A., initials H.A.

Q. How do you spell his last name?

A. F-e-d-e-r-a.

Q. Now then, your records show that there has been no change of that designation of him as master. Is that correct?

A. That is correct.

Q. Does Mr. Federa's name appear in any other records which you have in your official file relative to the barge LORETTA?

A. Yes.

Q. What is the document that you're referring to there?

A. Well, there are several.

Q. All right, sir. Tell us.

A. Mr. Federa executed the Oath of Registry and License of vessel. He's the signatory on that. He signed the application for an Award of Official Number. He signed the Declaration of an Officer of Incorporated Company, swearing that the company is a citizen.

Q. Of what country?

A. The company, Raymond International, Inc.

Q. Is a citizen of what country?

A. The United States.

Q. All right.

A. He also signed a Certificate of Organization of the Corporation, and his name appears on an addendum to that certificate showing that he's the secretary, general consul and senior vice president of Raymond International, Inc." (Depo. of Walter p. 508)

The only project on which the barge was to be used, the project being undertaken at the time of the accident, was Raymond International, Inc.'s project. This project was the construction of a trestle in the Arabian Gulf. Raymond International, Inc. in its annual report to stockholders unqualifiedly states that the trestle job is its trestle job and it affirmatively states that it is doing the trestle job.

Raymond International, Inc. advertised for employees to work on this trestle job and its barge, affirmatively stating that the workers are to be working on "our" (Raymond International, Inc.'s) trestle job in the Arabian Gulf.

Raymond International, Inc. told its prospective employees that it is building the trestle, (Vol. 3 p. 148).

Raymond International, Inc. hired all of the supervisory employees on the barge and maintained throughout the work on the project personnel files on those employees.

[4]Footnote cont.

"Q. Is there anything in the official documents of the Coast Guard documentation files or in the files of which you have custody at the home port in Houston which indicate that the LORETTA has been chartered to an alien?
A. No, sir.
Q. If the LORETTA had been chartered to an alien, what type of document would you expect to find in your file?
A. We would find an order executed by the Maritime Administration authorizing the vessel to be chartered by an alien.
Q. And is there such an order in your file?
A. No, sir." (Depo. of Walter P. 9-10).

On the day that the plaintiff was hired to work on the barge he was presented by Raymond International with a "statement for claiming benefits of Section 911 a(2)"; it was typed out and prepared for him to sign that day. That document, prepared by Raymond International, Inc. unqualifiedly states that he, Baker, is employed by Raymond International, Inc.

As many as 1,000 Americans were working on the trestle job at any one time; during the trestle project the supervisory (salaried) employees who were working on the trestle job as payroll employees of Raymond Saudi Arabia, Ltd. maintained and logged time for their pension benefits with Raymond International, Inc. and maintained coverage of Raymond International, Inc.'s hospitalization plan! (Vol. 4 p. 38-39, 35-36).

The above facts show that Raymond International, Inc. *did not* turn over its pile-driver barge "LORETTA" with no retention of control, possession or navigation. The actual fact is that Raymond International, Inc. was simply using its own boat on its project. It kept its vice president as the official master of the vessel and had it working under direct supervision of employees who were its own people, and had the boat working exclusively on its project. Thus there was no bareboat charter.

Moreoever, as a matter of law Raymond International, Inc., a United States corporation, could not have chartered the American flat vessel to an alien because the

federal regulations prohibit demise or bareboat charter of American vessels to aliens.

46 C.F.C. §221,7 (a) prohibits demise or bareboat charters to aliens. Raymond Saudi Arabia, Ltd. was an Arabian corporation, and thus any, attempted charter of the "LORETTA" to it was illegal, and therefore could not have accomplished the "complete transfer" necessary to in law constitute a bareboat charter. As the Court of Appeal stated:

> "Any attempted bareboat charter between Raymond International, Inc. and Raymond Saudi Arabia, Ltd. was void ab initio; a court cannot enforce an illegal contract to the detriment of an innocent third party. See Tampa Elec. Co. v. Nashville Coal Co., 276 F. 2d 766, 773 (6th Cir. 1960), rev'd on other grounds, 365 U.S. 320, 81 S.Ct. 623, 5 L.Ed. 2d 580 (1961); J. Murray, Murray on Contracts §§344, 346, 347 (2d rev. ed. 1974).

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[5] Demise or bareboat charter of American vessels to aliens is unqualifiedly prohibited in the 46 C.F.C. §221.7(a) as it has existed after March 1, 1977. As it existed prior to March 1, 1977, the regulation permitted application to be made to the Maritime Administration for a bareboat charter to a foreign citizen or corporation. As seen in footnote 4 no such application was made, and Raymond International, Inc. does not here contend that such an application was made.

> Raymond argues alternatively that, mutatis mutandis, the fact that Raymond Saudi Arabia, Ltd. had complete possession and control of the "LORETTA" absolves Raymond International, Inc. of liability. There is no support for this thesis that the mere surrender of control of a vessel absolves its owner. If a shield is possible, it can be provided only by a valid bareboat charter. '[A]nything short of. . . a complete transfer is a time or voyage charter party or not a charter party at all'; the owner remains liable for unseaworthiness. Guzman v. Pichirilo, 369 U.S. 698, 700, 82 S.Ct. 1095, 1096, 8 L.Ed. 2d 205, 208 (1962). An invalid transfer is scarcely a complete one". (656 F. 2d at 182)

Furthermore, there simply could not have been a bareboat charter. Not only was there no written charter agreement there was additionally *no direct contractual relationship at all* between Raymond International, Inc. and Raymond Saudi Arabia, Ltd., and, without a direct contractual relationship between an owner and a would-be bareboat charterer the complete conveyance of control, possession and navigation from one to the other (which is required in order for a bareboat charter to exist, as seen in *Guzman*, supra) simply could not take place.

Raymond International, Inc.'s corporate counsel testified:

> "Q. Now were there any contracts between Raymond Saudi Arabia, Ltd. and Raymond International which were in effect, as of the date of the accident?
> A. There were not.
> Q. No contracts?
> A. Directly with Raymond International, Inc.
> Q. And Raymond International, Inc. owned that vessel, the LORETTA?
> A. The documentation records show that Raymond International, Inc. owned that vessel or was the owner of that vessel.
> Q. And was the owner as of the time of this accident?
> A. Yes."

Since, as seen above, there was no contract between Raymond International, Inc. and Raymond Saudi Arabia, Ltd. -- and Raymond Saudi Arabia, Ltd. is the company which Raymond International, Inc. contends had the exclusive possession and control over navigation of the "LORETTA" -- there could not have been a bareboat charter.

In the trial, counsel for Raymond International, Inc. brought out in testimony from his witness, the chief project engineer for the trestle job, the facts that he alleges constitute the charter, this testimony is:

> "Q. Sir, are you familiar, or do you know what the arrangement with Raymond Saudi Arabia was for the use of the LORETTA on this project?
> A. Yes. The LORETTA ws sent to Saudi Arabia, and there is a billing system that goes back and forth. Raymond International Builders Liberia, Incorporated rent for the Barge LORETTA.
> Q. And what happens between Raymond International Builders Liberia and Arabia and Raymond Saudi Arabia?
> A. Would you rephrase that question?
> Q. What is the transaction between Raymond International Builders Liberia and Raymond Saudi Arabia?
> A. They -- in turn, Raymond International Builders Liberia, incorporated invoices Raymond Saudi Arabia Ltd., because Raymond Saudi Arabia Ltd. was the user of the barge." (Vol. 4 p. 81-82)

This "arrangement" falls far short of the "complete transfer" necessary to constitute a bareboat charter; if the arrangement completes a charter at all it would at most be

a time voyage charter for use on the Raymond International, Inc. project -- and such a charter would not constitute even an arguable ground that the owner should be absolved from unseaworthiness of the vessel.

There simply was no bareboat charter in this case. Thus the issue petitioner here seeks to have reviewed is one raised only in dicta in the appellate court decision.

THE FACTS OF THIS CASE RELATIVE TO INVOLVEMENT OF THE OWNER ARE SUCH THAT ANY RULING IN THIS CASE WOULD BE DISTINGUISHABLE IN FUTURE CASES

The instant case is *not* one in which a vessel owner bareboat charters his vessel to a stranger who uses it to carry cargo, and for which other navigation, to whatever ports and upon whatever missions the charterer may choose -- as is the normal situation. Far far from it. In fact,, the contrary is the case here, as seen from the facts detailed above. It is respectfully submitted that whatever pronouncements would come from a ruling on these facts would in the future legitimately be subject to distinguishment because of the particular facts relative to the involvement of the owner, and thus no clearly definable precedent would be achieved by hearing this case.

THE VESSEL WAS UNSEAWORTHY AT A TIME PRIOR TO THE TIME WHICH THE PETITIONER SUGGESTS THAT A BAREBOAT CHARTER CAME INTO EXISTENCE AND THIS UNSEAWORTHINESS CONTINUED THROUGH THE TIME OF THE ACCIDENT, AND THUS THE QUESTION WHICH THE PETITIONER STATES IS FOR REVIEW DOES NOT COME INTO PLAY

The vessel was unseaworthy as of the time that Raymond International, Inc. itself prepared the vessel for the trestle job. Raymond International, Inc. itself installed the crane on the vessel just before the commencement of the job. Some of the rollers in the crane boom had *never* been installed and remained absent as of the time of the accident.

The faulty conditions existent with the crane on the vessel "LORETTA" are detailed previously in this brief. These included wheels on the crane which had "flat areas", and "low spots" in the ring upon which the crane rotated, both of which caused the crane boom to "sway" when it had reached its intended point. The jury could conclude, and obviously did conclude, that the crane load, to-wit, the steel plate, bumped (causing a gash on the upper inside lip of the jack hole cylinder), causing the crane load to be dislodged from its bridle and fall upon Baker. Similarly, the "crevices" in the structure on the crane boom, which were caused by the fact that certain of the "rollers" on which the cable was supposed to ride along the crane boom, were ab-

sent would result in a jerky movement of the crane line because the cable riding in the crevice instead of on the rollers produced fraying which in turn caught in the crevice areas. Jerky movement of the crane line would also cause the crane load to miss its intended destination and strike the upper lip of the interior of the jack hole cylinder.

Raymond International, Inc.'s project engineer for the Saudi Arabia trestle job project testified that Raymond International, Inc. had over a several month period "fitted out" the vessel for the Saudi Arabian job and had spent a lot of money to put the vessel in condition to go to Saudi Arabia.[6]

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[6]

"Q. When did the barge go to Saudi Arabia?
A. I believe it left in early May, '78, to the best of my knowledge; I'll put it that way.
Q. And how long was it being fitted out for this voyage, roughly?
A. At least two months.
Q. What was it doing before that time?
A. It had been sitting for some time. I don't know exactly how long.
Q. Months?
A. Yes, probably several months.
Q. In other words, it would be fair to say that that barge was – had been destined to go to Saudi Arabia as of, say, January of 1978; is that correct?
A. Yes." (Vol. 5, p. 42)

"Q. What equipment did it have on it?
A. Well, the biggest piece of equipment ws a Manitowoc 4100 Ringer. There's obviously a lot of other pieces of equipment furnished, as well as those being drilled for drilling holes, all of the assorted rigging devices for lifting caps, generators for electricity, pumps. There was a mud system, an awful lot of onboard equipment. The crane was obviously the biggest piece.
Q. This 4100 Manitowoc Ringer, is that the crane that you referred to?
A. That is the crane, yes.
Q. What is the capacity of that crane, if you know?
A. Two hundred fifty tons.

It is patently clear that the above referred to unseaworthy conditions were conditions which were existent when Raymond International, Inc. was preparing its vessel to send it to Saudi Arabia for the trestle job.

THE DECISION OF THE COURT OF APPEAL WAS NOT BASED UPON THE QUESTION WHICH THE PETITIONER STATES IS PRESENTED FOR REVIEW. THE APPELLATE COURT'S TREATMENT OF THE LAW RELATIVE TO WHAT THE LAW WOULD BE IF THERE HAD BEEN A BAREBOAT CHARTER AND IF THE UNSEAWORTHY CONDITION HAD ARISEN ONLY AFTER SUCH A CHARTER IS EXPRESSLY SET FORTH IN HYPOTHETICAL (ACKNOWLEDGED DICTA) TERMS.

In the opinion, the author expressly couched his discussion of the question presented for review in hypothetical terms, making the discussion dicta. In the opinion the author stated:

> "Even assuming arguendo that there was a bareboat charter to Raymond Saudi Arabia, Ltd.. . ." (656 F. 2d at 182).

[6]Footnote cont.

Q. What was the general condition of the barge at the time it went to Saudi Arabia, if you know?
A. Well, the condition was good. There was a lot of time taken and a lot of money spent in order to put the barge in first class operating condition when it went over there." (Vol. 5, p. 29).

And he also stated:

> "A bareboat or demise charter (hereinafter called a bareboat charter), whereby the charterer assumes 'full possession and control of the vessel'. Reed v. S.S. Yaks, 373 U.S. 410, 412, 83 S.Ct. 1349, 1351, or charter that purports to invest temporary powers of ownership in the charterer and, therefore, constitutes the *only conceivable* basis on which the vessel owner *could seek* to escape liability for the unseaworthiness of the vessel." (Emphasis added) (656 F. 2d at 182)

The language quoted above makes it abundantly clear that the discussion of the question at issue is dicta.

THE COURT OF APPEALS IN ITS TREATMENT OF THE ISSUE CORRECTLY STATED THE LAW RELATIVE TO WHETHER A VESSEL OWNER CAN BE LIABLE IN PERSONAM FOR AN UNSEAWORTHY CONDITION WHICH AROSE AFTER ITS VESSEL WAS DELIVERED TO ANOTHER UNDER A BAREBOAT CHARTER.

The treatment of the issue in the appellate opinion is thorough and lucid. The undersigned will not attempt to expound or expand on that treatment, except to add that

the reasons, stated in the appellate opinion, for allowing the seaman to sue either the owner or the charterer for the unseaworthiness of vessel -- and leave it to them to sort out between them who will bear the final costs of recovery -- are doubly valid where as here the owner hires the seaman, tells the seaman he is his employee and where the owner maintains involvement -- not to mention that there is no written charter -- the *only* documents the seaman could check to determine the proper party against whom to bring his unseaworthiness action being the Coast Guard Documentation filed at the vessel's home port which showed the ownership of vessel and which showed that as of the time of the accident the official master of the vessel was the owner's vice president and which documentation had no reference to the alleged charter or charterer.

CONCLUSION

It is respectfully submitted that a writ of certiorari not be granted.

Respectfully submitted,

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CERTIFICATE

I, Philip E. Henderson, do hereby certify that I have this 22nd day of April, 1982, mailed, postage pre-paid, a true and correct copy of the foregoing Response to Petition for Certiorari to all counsel.

PHILIP E. HENDERSON

Petitioner's Reply Brief

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NO. 81-1448

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

RAYMOND INTERNATIONAL, INC.,
Petitioner

versus

GLENN PAUL BAKER, SR.,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONER

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NO. 81-1448

In the

SUPREME COURT OF THE UNITED STATES

RAYMOND INTERNATIONAL, INC.
Petitioner

versus

GLENN PAUL BAKER, SR.,
Respondent

Reply Brief of Petitioner

MAY IT PLEASE THE COURT:

This Reply Brief is filed for the sole purpose of indicating those portions of the Response to Petition for Certiorari which are factual representations of matters outside the record.

Petitioner respectfully contends that these references to matters outside the record are improper and should be dis-

regarded by this Court. Under separate cover, petitioner, Raymond International, Inc., has raised this point by a Motion to Strike those portions of the Response to Petition for Writ of Certiorari. Since the Court may prefer that the issue be presented by Reply Brief, the matters addressed in petitioner's Motion to Strike are also raised in this brief.

The portions of the Response to Petition for Certiorari which should not be considered by this Court because they are not of record are as follows:

On pages 15-17 --

> Raymond International, Inc. maintained [sic] its vice president[4] as official vessel master of the 'LORETTA' through the time of the accident and in fact through the time of the trial.

---

[4] See also the following deposi-

tion testimony of Stanley Walker, U. S. Coast Guard documentation officer at Houston, Texas:

> " 'A. Our record shows it's been ported in Houston since February 25, 1976.
>
> . . . .
>
> A. No, sir.' (Depo. of Walter P. 9-10)" [15-17]. 1/

The last sentence of note 5 on Page 19 again refers to this extraneous matter.

> As seen in footnote 4 no such application was made, and Raymond International, Inc. does not here contend that such an application was made.

The deposition of Stanley Walker, quoted at length in footnote 4, was never introduced into evidence in the district

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1/ Footnote 4 of the Response to Petition for Certiorari begins at the bottom of page 15 and extends to the bottom of page 17, occupying all of page 16.

court, nor referred to on appeal. Therefore, this deposition testimony and all factual representations based thereon, should be disregarded, because they are matters outside the record.

Careful research has disclosed no statute or rule that permits this Court to consider deposition testimony which neither was introduced into evidence at the district court nor in any manner made part of the record in the appellate court, and this Court should not countenance such an attempt. Kemlon Products and Development Company v. United States, 646 F.2d 223, 224 (5th Cir. 1981) cert. denied 102 S.Ct. 320; Rosen v. Lawson-Hemphill, Inc., 549 F.2d 205, 206 (1st Cir. 1976); Rachbach v. Cogswell, 547 F. 2d 502, 504 (10th Cir. 1976); United States v. Anderson, 481 F.2d 685, 702, n.19

(4th Cir. 1973) affirmed, 417 U.S. 211 (1974). Cf. Ramirez v. Sloss, 615 F.2d 163, 176, n.1 (5th Cir. 1980).

For the above stated reason, petitioner respectfully urges this Court to disregard the above-cited portions of the Response to Petition for Certiorari filed herein by respondent, Glenn Paul Baker, Sr.

Respectfully submitted,

for Eileen R. Madrid

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CERTIFICATE OF SERVICE

I hereby certify that three copies of this Reply Brief has been sent to each counsel of record for respondent by depositing same in the United States Mail, postage prepaid, this 7th day of May, 1982.

I further certify that all parties required to be served have been served.

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